No. 11954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 10/12/48 -- 45 COPIES

No. 11954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 10/12/48 -- 45 COPIES

INDEX

CASES CITED

STATUTES, ETC.

No. 11954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

In the present cause, appellant was regularly indicted, represented by counsel, tried and convicted on Counts I and II. Copy of the indictment is found on pages 2 to 5 of appellant's brief.

Jurisdiction is based upon Title 28 U.S.C. 41,

Title 26 U.S.C. 2554(a) and 2557(b), and Title 18 U.S.C. 88.

On Count I appellant received a sentence of three years and nine months; on Count II, a sentence of one day.

STATEMENT OF THE CASE

Ralph R. Macartney, Jr. and Leonard A. Douglas were prisoners in the Snohomish County Jail under State charges. Garfield C. Barnett was attorney for Macartney. Douglas had stolen the narcotic drugs referred to in the indictment. While in the jail, he informed Macartney that he had approximately 1,000 grains of narcotic drugs and asked Macartney what they were worth, and if he could sell them (R. 20). Macartney told Douglas that the drugs were worth $10.00 per grain; that he knew a user named Harvey Naylon; that his attorney, Garfield C. Barnett, appellant herein, would see Naylon (R. 21-23). On these facts being presented to Barnett, the latter agreed to take charge of the sale of the drugs (R. 24), and Douglas agreed to deliver the box of drugs to Barnett (R. 24).

Barnett went to Douglas' home and obtained the box of narcotic drugs from Douglas (R. 143).

The agreement between the three was one-third

to Douglas, one-third to Barnett, and one-third to Macartney — Barnett to deduct in addition his attorney's fee from Macartney's one-third (R. 30).

After receiving the drugs from Douglas, Barnett called upon Harvey Naylon at his residence in Seattle, the Ritz Hotel. He told Naylon that a client of his had some narcotics that were available to the extent of 1,000 grains; that the price was $10,000.00; that his name had been given him by Macartney. That he wanted to know if Naylon knew of anybody that wanted them, or if he could use them himself (R. 48).

Naylon was interested, and made an appointment to meet Barnett at his office in Everett. Barnett and Naylon went to the jail, and the three, Macartney, Barnett and Naylon discussed the sale. Macartney said the price was $10,000.00.

In order to prove to Naylon that the drugs were actually narcotics, he told Barnett to give Naylon a sample. Accordingly, Barnett and Naylon returned to Barnett's office and examined the box of drugs. Barnett gave to Naylon two bottles of cocaine, and one bottle of H.M.C. — 100 tablets containing hyosine, morphine and cactine (R. 53).

Naylon made a second trip to Barnett's office,

attempting to buy some of the drugs and to get the price reduced. On this occasion he told Barnett that the drugs were "hot" and he had better throw them in the river (R. 63). Barnett said that he had an interest in them and he was going through with it.

Naylon went a third time to Barnett's office. He told Barnett that he had a purchaser, but that the purchaser insisted on a sample. Accordingly, Barnett gave him a sample of morphine.

When Naylon failed to appear with the purchaser, Barnett went to the Ritz Hotel, met Mrs. Naylon, and told her to tell Naylon — "I am not after him with an axe, but tell him to get in touch with me right away. I made a bargain with him and I expect him to keep his end of it." (R. 125).

Naylon not having the money to purchase the drugs, notified the Federal Bureau of Narcotics concerning his dealings with Barnett. A phone call was put through by Naylon to Barnett. The exact words are to be found on page 112 of the transcript.

Naylon said, "I have got ahold of that man and he will take everything that you have got. He will only pay $6 a grain for all that you have got." Barnett hesitated for quite awhile. Finally he said, "O. K. — right; I will take it."

Arrangements between Naylon and Barnett were made for the purchaser to be at Barnett's office at 5:00 o'clock in the afternoon. Joseph A. Goode, a Narcotic Inspector, accompanied Naylon. Naylon introduced Goode to Barnett as "Joe", the man who had the money to buy the narcotics. Goode said he was the man that had the money; that he would not pay more than $6 a grain for the narcotics. Barnett said he would take that; that he had about one thousand — at least one thousand grains, and the price would be $6,000 (R. 88).

> "Q. Was there anything else said about the price or the quantity or anything else, Mr. Goode?
>
> A. Well, Mr. Barnett said he would sell them for six thousand dollars. And that was the price agreed on before he went out. Of course, I wanted to see the narcotics * * *." (R. 89)

Barnett left the office, returned with the narcotics, and said, "Here is the box of narcotics" and placed them on the table.

> "I looked at the bottles in this cigar box, and I had taken one of the morphine quarter grains. He (Barnett) got a piece of Kleenex, and I poured them on the desk and I says, 'Well, it looks like all of the tablets are here. I will take it'." (Goode's testimony R. 89)

Thereupon Goode disclosed his identity, and Barnett was placed under arrest.

ARGUMENT

There are two counts in the indictment, Count I as to sale of the narcotics; Count II as to conspiracy. At the close of the Government's case, counsel for appellant made no motion as to Count II, the conspiracy count. The only motion that appears in the record is as follows:

> "At this time, if your Honor please, at the close of the Government's case, on behalf of the defendant, I move the Court for judgment of acquittal as to Count I."

He did file a motion for a new trial and for judgment notwithstanding the verdict of the jury after the verdict was returned.

As to Count II, there can of course, be no question as to the sufficiency of the evidence.

The evidence disclosed the agreement, which was undisputed, and the commission of six overt acts, all within the Northern Division of the Western District of Washington. All were not only proven, but undisputed—

1. The conversation between Macartney and Douglas (R. 20);
2. That Barnett drove from Everett, Washing-

ton, to the home of defendant, Leonard Douglas (R. 150);

3. That on January 17, 1948, at Snohomish, Washington, defendant, Douglas delivered to Barnett a box containing narcotic drugs (R. 150);
4. The conversation between Macartney, Naylon and Barnett (R. 60, 26);
5. On or about February 7, 1948, at Everett, Washington, Barnett gave to Naylon two bottles, each containing a narcotic drug (R. 53);
6. On or about February 7, 1948, at Everett, Washington, the defendant, Garfield C. Barnett, delivered to Joseph E. Goode a box containing the drugs described in the first count of the indictment (R. 89).

The agreement being proven, and one or more overt acts in furtherance of the agreement, there is no question as to specifications three and four as far as Count II of the indictment is concerned.

As to specification number two, appellant neither referred to it in the brief, nor did he raise any such issue during the trial.

As to specification number one, the testimony referred to is not specified. However, during the trial, counsel objected to the conversation between defendants Macartney and Douglas relating to the drugs in question — overt act number one of the indictment.

The Court properly instructed the jury concern-

ing this testimony, not only during the trial, but also in his instructions to the jury (R. 144), (R. 20), (R. 169).

In a conspiracy case, the Government is entitled, and should show the existence of the conspiracy from the beginning.

United States v. McGuire, 64 Fed. (2d) 485.

The order of proof rests in the discretion of the trial judge. He may, in his discretion, permit the admission of evidence requiring a preliminary foundation prior to connection.

Ashbaugh v. United States, 13 Fed. (2d) 591;
Beavers v. United States, 3 Fed. (2d) 860;
Gladstone v. United States, 248 Fed. 117.

The conspiracy started with the agreement between Macartney and Douglas. This is the testimony referred to in the specification. The agreement therein made was immediately accepted by Barnett and from that moment he was the active participant in the execution of the conspiracy.

A conspirator is criminally responsible for the acts of his co-conspirators which are committed in furtherance of the common design and follow incidentally as the natural and probable consequences

of such design, even though he was not present when the acts were committed.

Bartlett v. United States, 166 Fed (2d) 920;
Cummings v. United States, 15 Fed. (2d) 168;
United States v. Rosenberg, 150 Fed. (2d) 788;
Ford v. United States, 10 Fed. (2d) 339.

In the case of *United States v. Woods*, 66 Fed. (2d) 262, the Court properly states the law as follows:

> "It is said that it was error to permit Mills to testify that Mrs. Woods told him she would have Libero Santaniello get the $150 which Libero gave Mills the next morning but that was admissible under the well known principle that what one conspirator says about the scheme while it is being carried out may be shown against all."

And the case quoted by appellant in his brief — *Quercia v. United States*, 70 Fed (2d) 997, is to the same effect.

There was not only no error in the admission of the testimony, but the testimony herein is almost identical with the facts related by appellant to Allyn B. Crisler (R. 99), and to Giordano (R. 115).

AS TO COUNT I.

Title 26 U.S.C., 2554 provides:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs

> mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary * * *"

Section 2550(a) includes the drugs herein involved. Joseph A. Goode had no written order (R. 93).

Appellant had these drugs for sale. He had been endeavoring to sell these drugs to Naylon. The agreement to sell was made over the phone. Goode told Barnett that he would not pay more than $6 per grain for the narcotics. Barnett said he would take that. He said he had about 1,000 — at least 1,000 grains, and it would be six thousand dollars (R. 88).

Barnett said he would sell them for $6,000. Goode agreed to that figure (R. 89).

Barnett had Naylon and Goode step out of the room. He returned with the narcotics. He placed them on the table and Goode took them and said: "Well, it looks like all of the tablets are here. I will take it."

In this case, the terms of the sale were all agreed upon — delivery was made, the only thing remaining was the payment of the purchase price.

Proof of these facts constitutes a violation of the narcotic laws.

The leading case is *Hammer v. United States*, 249 Fed. 336. In that case the Court ruled that if the parties had agreed on all the terms, and nothing remained to be done, except at delivery the payment should be made, then a sale was completed when the contract was made.

(Quoting *Hatch v. Standard Oil Co.*, 100 U.S. 124, 25 L. Ed. 554.)

This was followed by *Fisk v. United States*, 279 Fed. 12, in which case this identical question arose. The Court said (page 15):

> "The claim of the defendant in error that the evidence failed to show a completed sale is merely technical. The price had been agreed upon, and the drugs delivered by the defendant to Anderson, accepted by him, and were then in his possession and under his control. True, Anderson had not yet paid the defendant the price agreed upon, at the time he placed him under arrest. Nevertheless if the drugs sold and delivered had been commodities of lawful or unrestricted commerce, the seller, upon this state of facts, could have maintained an action for the contract price of goods sold and delivered to the buyer."

The Hammer case has been cited with approval in this Circuit in the case of *Reyff v. United States*, 2 Fed. (2d) 39:

> "At the time when the automobile entered the garage the negotiations * * * were no longer in the class of mere executory agreements. They had resulted in a sale whereby the right and title to the liquor had passed to the purchaser. The terms had been agreed upon and complied with. The purchase money had been paid and nothing remained to be done but to deliver the property at the place agreed upon, and the property had been brought to that place to be taken out of the automobile and placed upon the floor of the garage."

Quoting *Hammer v. United States*, 249 Fed 336;

Hatch v. Standard Oil Co., 100 U.S. 124, 25 L. Ed. 554.

And in the case of *Hurwitz v. United States.* 299 Fed. 453, the *Hammer* case was quoted with approval. In that case an addict phoned a physician offering to purchase narcotics. The physician came to the house. The $50.00 was paid, but there was no delivery. The Court upheld the conviction.

And in the case of *Ahearn v. United States*, 3 Fed. (2d) 808, this Circuit again cited with approval the doctrine of the *Hammer* case. Judge Rudkin speaking for the Court said:

> "As to the whiskey mentioned in the second count, it clearly appears from the testimony that the parties had fully agreed upon all the terms of the sale, the quantity to be sold, * * * and that delivery was in fact made. Nothing remained

to be done but the payment of the purchase price, and for this an action would lie."

Counsel for appellant took no exception to the instructions. The appellant herein was well represented and had a fair trial. The law is plain. The conviction of the appellant should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

HARRY SAGER
Assistant United States Attorney